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IN THE

Supreme Court of the United States

October Term, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

REPLY BRIEF

Statement of Position

It is the position of Appellants, Atlantic City Electric Company, et al., that the entire final order of the Interstate Commerce Commission ("Commission" or "ICC"), the underlying record it relied on, and the procedures it followed in its general revenue proceeding, "Increased Freight Rates, 1967, Ex Parte 259," are judicially reviewable. The Department of Justice argues on behalf of the United States, the Commission and the Secretary of Agriculture (collectively, the "Government"), that only part of such order is now reviewable. The Aberdeen & Rockfish Railroad Company et al. (the "railroads"), argue that no part of the order is now reviewable.

The respective complaints of all the Appellants, Atlantic City Electric Company, et al. ("Utility Appellants"), and the State of New York and the Departments of Agriculture

of ten eastern states ("State Appellants"), were so drawn as to attack in all of its aspects* the Commission's final order in the general revenue proceeding. The piecemeal review of the order, which the Government argues for, can result only in chaos and protracted uncertainty for Federal district courts, the Commission, the nation's shippers, and the railroads. Furthermore, the basic issues decided in a general revenue proceeding cannot, under any existing statute, properly be retried or reviewed in any further Commission proceeding. The issues raised by Appellants' complaints with respect to the Commission's procedures, findings, conclusions, and final order in its general revenue proceeding are not, as contended by the Government and the railroads, cognizable in complaint proceedings under §13 and §15(1) of the Interstate Commerce Act. These issues, having been finally decided by the Commission's order, are ripe for review by the three-judge statutory court provided for by Congress in the Urgent Deficiencies Act at 28 U.S.C. §1336.

Neither of the opinions below discussed the merits of the cases in any degree, but decided merely that the decision of the Commission was not reviewable at this time. The railroads have argued the merits of the Commission's decision, to which these Appellants do not reply, since they believe that there must be a trial on the merits below. The decision below should be reversed and the case remanded for trial.

Argument

The briefs submitted by the Government and the railroads outline the evolution of general revenue proceedings at the

* Although all the Federal parties agree that the Southern District Court's opinion in this case was wrong, the ICC argues that the *Atlantic City* case should not be remanded, because it asserts that Appellants' complaints did not attack the Commission's findings as to general revenue needs and costs of the railroads. This position is based on the ICC's opinion that only those portions of its order relating to revenue needs and overall costs of the railroads are reviewable.

Commission and the history of the particular proceeding under appeal. Both stress the value and importance of general revenue proceedings to railroad ratemaking and regulation. The Utility Appellants and State Appellants agree that this kind of proceeding is an important tool in railroad ratemaking. However, it follows from this that far more weight and finality must be accorded to the determinations made by the Commission in such general revenue proceedings than either the Government or the railroads here have conceded.

All Appellants herein assert not only that the ICC made a final determination as to the railroads' costs and revenue needs, as conceded by the Government, but that it also made a final determination as to how the additional revenue should be raised, that is, how much of it should be derived on a commodity-by-commodity basis from the various percentage increases authorized. For example, the ICC found that all coal freight rates could be raised 5%.* It also found that coal traffic would not be diverted by such an increase. All such findings are appropriate and necessary to a general revenue proceeding, wherein proposed rates are under investigation, and should be accorded finality and immunity from collateral attack. As a necessary concomitant of such finality, of course, Utility and State Appellants assert that there must also be judicial review of all such determinations in accordance with the established standards of judicial review set forth in the Administrative Procedure Act and upheld by decisions of this court. (See, for ex-

* The Government and the railroads argue that the ICC's findings on allocation of the general rate increase among commodities were preliminary in nature only, but in fact, such findings were detailed and final. For instance, the Commission considered, among other things, whether the rates on shelled walnuts should be increased by 6%, as the railroads requested, or whether such rates should be increased only as much as the increases proposed on nuts in shell, that is, 5%. After discussion of the problem, the Commission decided that both shelled and unshelled walnut rates should take the same increase of 5% (Appendix pp. 348a-349a).

ample, *City of Chicago* v. *U. S.*, 396 U. S. 162 (1969); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1969); *Association of Data Processing Service Organizations, Inc.* v. *Camp, Comptroller of the Currency*, 397 U. S. 150 (1970); and *Barlow* v. *Collins, Executive Director, Alabama Agricultural Stabilization & Conservation Service*, 397 U. S. 159 (1970)).

The position of the Government is that only the Commission's determinations as to railroad costs and revenue needs are reviewable at this time but that other issues require further administrative action before becoming ripe for review.* The railroads go even further and assert that nothing decided in a general revenue proceeding is final or immune from subsequent relitigation before the Commission.

Both these positions are unrealistic, and are not contemplated by the Interstate Commerce Act.

The Substantive Issues Determined in a General Revenue Proceeding are not Subject to Relitigation under the Interstate Commerce Act.

As more fully stated in Appellants' initial brief, among the issues necessarily to be considered in a general revenue

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* Appellants believe that this is a correct statement of the position of the Government from language which appears at various places in its brief. However, at other places therein, the Government brief seems to argue for far broader reviewability. For example, at page 21 thereof it notes that:

> "Insofar as the appellants in *Atlantic City Electric* attack the Commission's failure, in the general rate proceeding, to consider costs, revenue needs and *rate of return on a commodity-by-commodity* basis the United States believes that they state a claim for judicial review . . ." (Unless otherwise stated, all emphasis in this brief is added.)

At page 44, commenting upon paragraphs 12 and 14 of Atlantic City's complaint, the Government states:

> "The United States interprets these allegations [in paragraphs 12 and 14] as amounting to a general objection that the Commission misapprehended the issue as to revenue needs and *should have considered the railroads' needs commodity-by-commodity rather than in gross.* In the view of the United States such an objection . . . is subject to direct judicial review."

proceeding are not only general revenue needs, but whether such needs will be met by the proposed rates. In other words, the Commission is bound under the statute* to consider whether the proposed rates will not in fact divert traffic from the carriers and hence reduce, rather than increase, revenues. Whether the proposed rates would in fact result in diversion was a primary issue raised by these Appellants in the general revenue proceeding, and the total lack of evidence to support the Commission's findings in this regard was one of the primary grounds for reversal set forth in these Appellants' complaints. The position of the Commission and the United States as well as the carriers would require Appellants to attempt to relitigate this issue in a §13 and §15 proceeding.

However, §§13 and 15(1) of the Act do not contemplate determination of diversion on a commodity-by-commodity basis in proceedings brought thereunder. Such proceedings are merely to determine whether particular rates are "just and reasonable" and are not "unjustly discriminatory or unduly prejudicial or preferential". Moreover, the sanctions imposed by §§13 and 15, i.e., reparations to the shipper, could hardly be applied to a carrier who established that its rates are just, reasonable, nondiscriminatory and nonpreferential. However, particular rates could meet all of these criteria of §§13 and 15 and still, because of competitive factors, be high enough to drive traffic off the rails. Whether diversion on a commodity-by-commodity basis will result from a general revenue increase is precisely what the Commission is mandated to consider at the time general rate increases are proposed, that is, in a general revenue proceeding, before permission to increase rates is granted.

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* As the Government concedes in its brief in its "rule of ratemaking" discussion at pages 4-5 thereof.

Since this is the time such determination is made finally, it is also the time when such determination becomes judicially reviewable.

Lack of Finality of Findings in General Revenue Proceedings Would Cause Administrative Chaos.

For an illustration of the chaotic effects of the alternatives suggested by the railroads and the Government, reference may be had to what could occur if their suggestions were adopted in this case. A group of utility coal shippers contended in the general revenue proceeding in the Commission that the coal freight rates to the Northeast would drive coal traffic from the rails, in favor of oil and nuclear energy. A "Sub-Part" of the general revenue proceeding was set up purportedly to hear this contention. In another Sub-Part relating to grain, State Appellants raised the same contention with regard to diversion of grain traffic which would result from the proposed rates. It is now suggested by the Government as well as the carriers that the proceedings in such Sub-Parts were a nullity; that the findings made therein were not final and hence are not reviewable, and that the issues raised therein are all subject to being relitigated and should be relitigated in §13 and §15 proceedings.

As has been noted above, any action under either of these sections of the statute cannot properly include the issue of diversion. However, assuming the statute permitted such relitigation, it is plain that the remedy proposed would create a far worse burden on the carriers, the Commission and the shippers than would the procedure actually followed below.* Each of the utilities who participated in the Com-

* It should be noted that the Appellants do not argue against the procedure of setting up sub-parts in the general revenue proceeding to hear such issues; their quarrel is with the manner in which such hearings were conducted and with the insufficiency of the evidence produced therein to support the Commission's findings.

mission proceedings below, under the railroads' and the Government's view of finality, must now seek to relitigate this issue of diversion as to their individual movements of traffic. Similarly, each of the hundreds of other shippers who participated in the Sub-Part Nos. 3-11 proceedings below, must proceed in the same fashion.

Since there is no time limit (not even laches, which might be applicable to seeking review of the order in a general revenue proceeding) to the institution of a §13 or §15 proceeding, there is no way in which the Commission can consolidate into a single hearing the multiplicity of proceedings which could well be instituted over an extended period. Furthermore, no one shipper could be bound in any way by determinations of any of these issues in any other hearing to which he was not a party. It appears, therefore, that the Commission could be inundated with §§13 and 15 proceedings, each of which would be judicially reviewable. Moreover, if a reasonable proportion of the shippers were ultimately successful in having the rates overturned as to them, the effectiveness of the Commission's general revenue order increasing railroad revenues could be substantially diluted.

It is far more sensible to hear, in one proceeding, with finality, evidence as to the competitive effect of coal rates to the Northeast than it would be, as the Government and railroads propose, to have separate litigations under §§13 and 15 (if this issue were at all cognizable under such sections) as to whether coal freight rates would reduce traffic respectively to the Atlantic City Electric Company, Public Service Electric & Gas Company, Rochester Gas and Electric Corporation, Niagara Mohawk Power Corporation, Central Hudson Gas & Electric Corporation, Orange and Rockland Utilities, Inc., Consolidated Edison Company of New York, Inc., Long Island Lighting Company, Jersey Central Power and Light Company, New Jersey Power and Light Company and Metropolitan Edison Company, all of

whom were parties to the Interstate Commerce Commission's Sub-Part No. 3 proceedings.* Not only is it more economical in terms of time to try the issue in a general revenue proceeding, but it also gives the Commission the opportunity, if it finds that possible diversion precludes the full requested increase on one commodity, to make necessary adjustments in other rates to produce required overall railroad revenues. Such adjustment in other rates could not be made as part of a §13 or §15 proceeding.

Similarly, the issues of whether the coal and grain traffics overall provide the railroads with unduly high contributions in excess of the related costs of service, can much more economically be litigated in a single proceeding to which all such shippers can be party and by which they would all be bound. To achieve this objective, however, also requires that the determinations made in such a proceeding be final and judicially reviewable. The Commission itself recognized the necessity for this finality in general revenue orders in the *Koppers* case (*Koppers Co. Inc.* v *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383 (1958)). Its decision therein was completely correct for the reasons noted above.

Relitigation in the Commission Cannot Protect Procedural Rights

Finally, these Appellants once more emphasize that they have a constitutional and a statutory right to procedural safeguards in a general revenue proceeding. Even if one could accept the Government's contention that violation of these procedural rights is reviewable in a §13 or §15 proceeding, as to which we have already detailed our disagree-

* The question of diversion from the rails of utility coal traffic was also raised by other coal shippers, including some of the *Alabama Power* appellants, in the Sub-Part No. 3 proceedings below.

ment, it is obviously far more expeditious to have final Commission action and procedures reviewed in an appeal from the general revenue proceeding than to require the shippers to undertake first a multiplicity of §§ 13 or 15 proceedings, each of which will consider the identical record of the general revenue proceeding.*

Judicial review of the totality of general revenue orders is the most expeditious and least burdensome procedure for determining propriety of the decision on the issues therein.

Judicial Review at this Stage is Practicable

If judicial review of the Commission's order is mandated now by this Court, the carriers conjure up a vision of shippers bringing review proceedings from general revenue order in virtually every district court in the United States. Review proceedings from the order in Ex Parte 259 thus far have been brought in only two district courts in the United States. Even if future proceedings should cover a wider geographical area, it seems fair to assume that the judicial apparatus that has handled such mammoth litigations as the electric anti-trust cases with a minimum of disruption could deal with such appeals on an expeditious basis.

The Government notes in its brief that there are various ways of handling the problem, should it arise. These include the venue transfer provisions (28 U.S.C. § 1404(a)) of the Judicial Code, and the use by the district courts of their discretion to stay cases pending before them until

* Since in each such case, the shipper would be asking the Commission to find that it had committed procedural error in the general revenue proceeding, obviously each such proceeding would be merely a prelude to a district court review which would only then, in the Government's view, be appropriate.

the outcome of the original suit is known. Either of these suggestions appears highly appropriate.*

Additionally, consideration might be given to the appointment of a Special Master on behalf of all the district courts before whom actions were started. He could hear the evidence and report thereon to each of the district courts on the issues pertinent to the action pending in that district. Such use of a Special Master (the normal procedure in original actions in this Court) would appear to be a wise economy of judicial time.

The Government suggests that the *Atlantic City* case should be stayed until a decision is reached in *Alabama Power*. *Alabama Power* raises narrower contentions than *Atlantic City Electric*, and it is respectfully submitted that such a stay would be improper. If the cases are remanded, they could be tried before a Special Master appointed by the two courts, as discussed above.

This Court cannot properly decide the merits of this action.

Appellants' complaint below was dismissed on a motion made by the Commission and joined in by the railroads on the grounds that it failed to state a claim upon which relief could be granted. The court never decided the merits of the complaint. It is absurd to now contend that this Court should consider the sufficiency of the evidence in a 5,074 page record. Neither should the Court rely, as the railroads suggest, upon the ICC's own decision as authority for the adequacy of the evidence underlying that decision.

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* There is no time limit specified for judicial review under the Interstate Commerce Act, but as a practical matter any appellant who did not bring his action in adequate time to consolidate with other pending review proceedings could well be deemed guilty of laches and his action barred on that basis.

CONCLUSION

Both cases should be remanded for trial with direction from this Court that the order of the ICC is now judicially reviewable in its entirety.

Respectfully submitted,

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